

STATE OF VERMONT
HUMAN RIGHTS COMMISSION

Kim Brittenham individually and)	
o/b/o Ash Brittenham,)	
Charging Parties)	
)	
vi.)	CHARGE NO. PA12-0028
)	
Montpelier Middle School)	
and Montpelier School District)	
Respondents)	

This Post-Determination Conciliation Agreement is hereby approved and no further action, other than any action necessary to enforce the anti-discrimination terms and conditions of this agreement, will be taken by the Human Rights Commission regarding the charge of public accommodation disability discrimination, HRC Charge No. PA12-0028.

Dated at Winooski, Vermont, this 30th day of May, 2013.

By: Mary C. Marzec Gerrior
Mary Marzec Gerrior, Chair

Nathan Besio
Nathan Besio, Commissioner

Mary Brodsky
Mary Brodsky, Commissioner

Mercedes Mack
Mercedes Mack, Commissioner

Donald Vickers
Donald Vickers, Commissioner



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INVESTIGATIVE REPORT PA12-0028

CHARGING PARTY: Kim Brittenham individually and o/b/o
Ash Brittenham

RESPONDING PARTY: Main Street Middle School/
Montpelier School District

CHARGE: Public accommodations/disability

SUMMARY OF CHARGE: On June 13, 2012, Kim Brittenham filed a charge of discrimination alleging that Main Street Middle School and Montpelier School District discriminated against her son, Ash Brittenham, because of his disability. Specifically, Mrs. Brittenham stated that on May 15, 2012, she and Ash went to the Savoy Theater in downtown Montpelier for a school sponsored film showing. When Mrs. Brittenham and Ash arrived at the theater, they learned that the film was scheduled to be shown in the basement of the theater, an inaccessible space for Ash (who uses a wheelchair). The school staff member who scheduled the event apologized and acknowledged that she did not consider Ash's need for access. Mrs. Brittenham and Ash then left the theater, unable to watch the film.

SUMMARY OF RESPONSE: On August 1, 2012, Main Street Middle School and Montpelier School District filed a response to the charge of discrimination acknowledging the school's oversight in considering Ash's need for accessibility to the school sponsored activity at the Savoy Theater. In addition, the school provided information about the changes that have been made to school forms and procedures to ensure that such oversight does not occur again in the future.

PRELIMINARY RECOMMENDATION: This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are **reasonable grounds** to believe that Main Street Middle School and Montpelier School District discriminated against Ash Brittenham because of his disability in violation of 9 V.S.A. §4502(c)(1) of the Vermont Fair Housing and Public Accommodation Act.

SUMMARY OF INVESTIGATION:

Interviews:

Ash Brittenham, 8/13/12
Kim Brittenham, 8/13/12
Pam Arnold, 10/5/12
Sylvia Fagin, 10/5/12

Documents:

Charge of Discrimination, 6/13/12
Response to Charge, 8/1/12
Response to request for information from Charging Party, 8/13/12
Response to request for information from Respondent, 9/26/12

Elements of prima facie case:

1. Charging party has a disability within the meaning of the VFHPAA and ADA;
2. The respondent is a place of public accommodation;
3. The charging party was denied access to goods, services, facilities, privileges, advantages or accommodations because of an architectural barrier;
4. The removal of the architectural barrier was readily achievable.

I. Facts

A. Background

1. During the 2011-2012 school year, **Ash Brittenham** was an 8th grade student at Main Street Middle School in Montpelier. Ash has Duchenne muscular dystrophy and uses a power wheelchair at all times. **Kim**

Brittenham is his mother.

2. **Pam Arnold** is the Principal and **Sylvia Fagin** is the English Language Learning and Community-Based Learning Coordinator for Main Street Middle School.

B. The circumstances

3. The following facts are undisputed:

- On May 15, 2012, Main Street Middle School scheduled a showing of a film made by MSMS students at the Savoy Theater in downtown Montpelier.

- The film was shown in the downstairs theater which is currently inaccessible to people who use wheelchairs.
- When planning the event, the school did not check for accessibility at the Savoy Theater.
- When Ash and his mother arrived at the theater on May 15, 2012 and found they could not access the film screening, Sylvia Fagin, the coordinator of the event, spoke with them and apologized for not having considered Ash's accessibility needs.
- Mrs. Brittenham spoke with the theater staff and they offered to carry Ash's wheelchair downstairs but he declined this offer.
- The next day Mrs. Brittenham spoke with Pam Arnold, the principal of MSMS. Ms. Arnold apologized to Mrs. Brittenham about the oversight and they discussed the need for the school to have a policy and checklist to make sure that all school events are accessible.
- Mrs. Brittenham also spoke with the superintendent and Ms. Fagin, both of whom apologized (again).

4. The following information is disputed:

- The school said that the flyer announcing the film showing on May 15, 2012 would take place in the downstairs theater at the Savoy Theater. The flyer, a copy of which was provided by the Brittenhams, makes no mention of the use of the downstairs theater.

5. Changes Main Street Middle School has implemented since the incident on May 15, 2012:

- The school's forms for field trips and special events have been modified and now include a requirement that accessibility in transportation and venues have been verified.
- Ms. Arnold conducted a training with all school staff in August 2012 during which she reviewed the new forms and the changes related to accessibility needs.
- After the incident on May 15th, Ms. Fagin contacted the owner of the Savoy Theater to ask if he would be interested in having a service learning group from the high school look into making the back door to the downstairs theater accessible. Ms. Fagin suggested building a ramp at that back entrance. Ms. Fagin also contacted the service learning coordinator at the high school about this proposal but has not heard back from coordinator yet in this new school year.

6. Other accessibility modifications the school implemented before Ash enrolled at Main Street Middle school in 2009:

- Automatic door openers were installed at the accessible front entrance, for the door to Ash's 7th and 8th grade classroom, and at the door to the playground.
- Signage was posted at the front of the school indicating the location of the accessible entrance.
- An internal ramp was modified to be in compliance with ADA maximum slope requirements.
- The elevator was unlocked and made available for use; it was previously locked for security reasons but now has a camera to address any security concerns.
- A paved sidewalk was installed on the playground, replacing a gravel pathway, to make more of the playground area accessible.

II. Analysis

9 V.S.A. §4502(c)(1) and (8) of the Vermont Fair Housing and Public Accommodations Act (VFHPAA) provides:

(c) No individual with a disability shall be excluded from participation in or be denied the benefit of the services, facilities, goods, privileges, advantages, benefits, or accommodations, or be subjected to discrimination by any place of public accommodation on the basis of his or her disability as follows:

(1) A public accommodation shall provide an individual with a disability the opportunity to participate in its services, facilities, privileges, advantages, benefits, and accommodations. It is discriminatory to offer an individual an unequal opportunity or separate benefit; however it is permissible to provide a separate benefit if that benefit is necessary to provide an individual or class of individuals an opportunity that is as effective as that provided to others.

* * * * *

(8) Notwithstanding the provisions of this section, if a place of public accommodation has an architectural or communication barrier, in order to comply with this section, the public accommodation shall remove the barrier, if removal is readily achievable, or shall make its goods, services, facilities, privileges, advantages or accommodations available through

alternative methods, if those alternative methods are readily achievable. Nothing in this subsection shall be construed to alter architectural barrier removal requirements under the federal Americans with Disabilities Act and its regulations as they relate to governmental entities.

In addition, the VFHPAA at 9 V.S.A. §4501 states, in pertinent part:

(1) "Place of public accommodation" means any school, restaurant, store, establishment or other facility at which services, facilities, goods, privileges, advantages, benefits or accommodations are offered to the general public.

(2) "Handicap" or "disability," with respect to an individual, means:

(A) a physical or mental impairment which limits one or more major life activities,

(B) a history or record of such an impairment, or

(C) being regarded as having such an impairment.

* * * * *

(9) "Readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, the factors considered in determining whether an action is an undue burden pursuant to subsection (10) of this section apply.

The legal standards established by the VFHPAA are expressly intended to be congruent with the federal Americans with Disabilities Act (ADA),¹ specifically with regard to governmental services. The pertinent rules and regulations regarding the ADA can be found at 28 C.F.R. 36.304 and in the Americans with Disabilities Act Accessibility Guidelines (ADAAG), found at 28 C.F.R. Part 36, Appendix A.

Mrs. Brittenham alleged that Main Street Middle School and Montpelier School District discriminated against her son, Ash Brittenham, because of his

¹ See 9 V.S.A. §4500(a).

disability. In order to establish a prima facie case of discrimination, Mrs. Brittenham must show the following:

1. Ash Brittenham has a disability within the meaning of the VFHPAA and ADA;
2. Main Street Middle School is a place of public accommodation;
3. Ash was denied access to goods, services, facilities, privileges, advantages or accommodations because of an architectural barrier;
4. The removal of the architectural barrier was readily achievable.

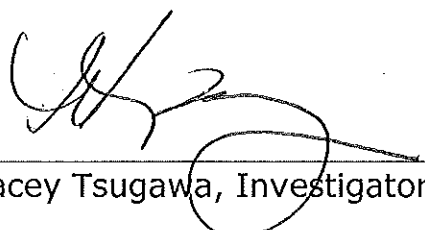
Ash Brittenham uses a wheelchair to ambulate at all times (first element). Main Street Middle School is a public school and therefore a place of public accommodation (second element). On May 15, 2012, Ash was denied access to a school sponsored film screening at the Savoy Theater because the basement theater is inaccessible to people who use wheelchairs (third element). As alternatives to the downstairs theater at the Savoy Theater, the school could have scheduled the film screening in the upstairs theater at the Savoy Theater or at the school's auditorium, both of which are accessible for people who use wheelchairs. Therefore, the removal of the architectural barrier (via alternative locations) was readily achievable (fourth element). Mrs. Brittenham has established, through a preponderance of evidence, her prima facie case.

The burden now shifts to the school to show that the removal of the architectural barrier was not readily achievable. The school cannot make such a showing and does not attempt to do so. To its credit, the school apologized numerous times to Ash for its oversight and has made changes to several forms and procedures to prevent any such oversight in the future. The school also implemented numerous architectural modifications prior to Ash's enrollment in 2009 to make the entire school more accessible. In addition, the contacted both the Savoy Theater and the local high school to propose a project to make the back door to the downstairs theater accessible. Finally, the school provided a special showing of the film to Ash's

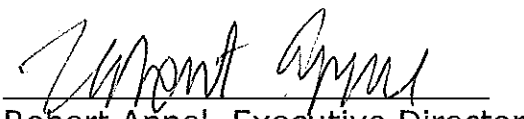
academic team at Main Street Middle School, albeit after the fact of denying Ash access to the original event with his peers at the Savoy Theater.

Nonetheless, providing an opportunity for Ash to view the film at school after May 15, 2012 does not make up for the humiliation and disappointment Ash experienced on May 15, 2012 at the Savoy Theater. The Americans with Disabilities Act was enacted in 1991, presumably to prevent discrimination against people with disabilities from that point forward. This example of the impact of the continuing lack of awareness and attention to accessibility needs 20 years later only reinforces the need for such laws and continuing education about accessibility issues.

PRELIMINARY RECOMMENDATION: This investigative report makes a preliminary recommendation that the Human Rights Commission find that there are reasonable grounds to believe that Main Street Middle School and Montpelier School District discriminated against Ash Brittenham because of his disability in violation of 9 V.S.A. §4502(c)(1) of the Vermont Fair Housing and Public Accommodation Act.



Tracey Tsugawa, Investigator



Robert Appel, Executive Director

10/22/12
Date

STATE OF VERMONT
HUMAN RIGHTS COMMISSION

Kim Brittenham Individually and o/b/o
Ash Brittenham

v.

Main Street Middle School/
Montpelier School District

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HRC Charge No.PA12-0028

FINAL DETERMINATION

Pursuant to 9 V.S.A. Section 4554, the Vermont Human Rights
Commission enters the following Order:

1. The following vote was taken on a motion to find that there are
reasonable grounds to believe that Main Street Middle School/Montpelier
School District the Respondents, illegally discriminated against Ash Brittenham
the Charging Party, in violation of Vermont's Fair Housing and Public
Accommodations Act on the basis of Disability.

Mary Marzec-Gerrior, Chair

For ☒ Against ☐ Absent ☐ Recused ☐

Nathan Besio

For ☒ Against ☐ Absent ☐ Recused ☐

Mary Brodsky

For ☒ Against ☐ Absent ☐ Recused ☐

Mercedes Mack

For ☒ Against ☐ Absent ☐ Recused ☐

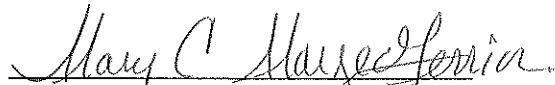
Donald Vickers

For ☒ Against ☐ Absent ☐ Recused ☐

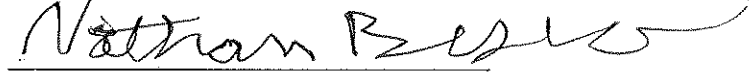
Entry: ☒ Reasonable Grounds ☐ Motion failed

Dated at Montpelier, Vermont, this 29th day of November, 2012. .

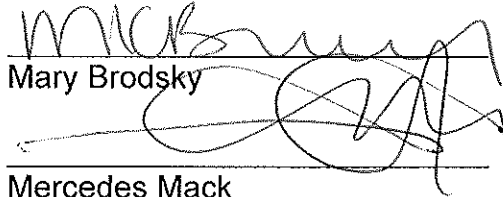
BY: HUMAN RIGHTS COMMISSION



Mary Marzec-Gerrion, Chair



Nathan Besio



Mary Brodsky

Mercedes Mack



Donald Vickers